STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

BERNARD J. MCQUADE, JOHN WILLIAMS MCQUADE, MICHAEL MORRIS MCQUADE, PRIME PARKING LLC, JOAN MCQUADE, f/k/a JOAN PATRICIA MCGUIRE, a/k/a JOAN MCQUIRE, JOANNE MCQUADE ARNOLD, JAMES MCQUADE, MORRIS MCQUADE, MICHAEL MCQUADE, JAMES F. MCQUADE, MAURICE MCQUADE, AND BRO. PETER JAMES MCQUADE,

Defendants-Appellees.

UNPUBLISHED
April 25, 2006

No. 258906
Wayne Circuit Court
LC No. 02-214467-CC

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals of right from a jury trial verdict and judgment entered on the jury verdict requiring it to pay defendants just compensation of $1.1 million in this condemnation action.[1] On appeal, plaintiff argues that it was denied a fair trial on the basis of (1) inflammatory and irrelevant comments made by defense counsel; (2) the exclusion of a witness for a discovery violation; (3) the exclusion of a relevant comparable for purposes of determining market value; and (4) the trial court's failure to give a special instruction requested by plaintiff. We affirm.

I

[1] At the time of the action, Bernard McQuade, John McQuade, Joanne McQuade Arnold, Michael McQuade, and Joan McQuade owned the property that was subject to the condemnation proceedings. An order apportioning compensation was entered providing: 14.2861% to Bernard, 14.2861% to John, 28.5695% to Joanne, and 14.2861% to Michael, and 28.5722% to Joan. These property owners will be referred to collectively as "defendants" and singularly by name. We note that the other McQuades and Prime Parking were included as interested parties.

On November 29, 2001, plaintiff presented defendants with what it considered a good faith offer for the purchase of its land being used as a commercial parking lot at Lafayette and Sixth Street in Detroit. Defendants declined the offer. On April 30, 2002, plaintiff filed a notice of taking and a condemnation complaint pursuant to the Uniform Condemnation Procedures Act (UCPA), MCL 213.51, and contended that: (1) plaintiff is a state agency, (2) the property is being taken pursuant to a condemnation action for a public transportation purpose, (3) plaintiff is vested with jurisdiction and authority over all Michigan highways constructed and/or maintained, (4) plaintiff is authorized to secure fee simple of the property, (5) it is necessary to secure the property for the construction of a bus terminal, and (6) a good faith offer was made and defendants refused.

At trial, plaintiff's expert Craig Fuller, a certified general real estate appraiser, valued the property at $605,000 with expenses for purposes of market value on April 30, 2002. Fuller testified that his market value was the highest likely price he anticipated that a property owner, who was reasonably prudent and knowledgeable, would pay for the purchase of the property from a willing seller. Defendants' expert Andrew Chamberlain, a real estate appraiser, valued the property at $1,100,000 (this included an extra $10 per square foot because of the potential of a casino being near) for purposes of market value on April 30, 2002. According to Chamberlain, the value of the property is increased when it is in the vicinity of the casino, and on April 30, 2002, the potential existed that a permanent casino would be near.

The trial court instructed the jury that the lowest valuation it could give was $605,000 (plaintiff's valuation) and that the highest value it could award was $1,100,000 (defendants' valuation). The unanimous jury verdict required plaintiff to pay defendants $1.1 million as just compensation.

II

Plaintiff's first issue on appeal is that it was denied a fair trial by defense counsels' inflammatory conduct. We disagree.

A. Preservation of the Issue

Plaintiff did not object to defendants' opening statements and request a curative instruction until the day after they were given and did not object at all to the closing arguments it now challenges. On the day after opening statements, plaintiff objected to the comments made during opening statements and asked the jury be instructed because defendants were questioning plaintiff's motives. The circuit court indicated that it did not hear these types of statements being made and overruled the motion. The trial court may have been in a better position to rule on these objections if they had been raised timely. Objections must be timely and specify the same ground for challenge as the party seeks to assert on appeal. *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Plaintiff's objection and request for a curative instruction the day after was not timely, thus, did not properly preserve the issue. In addition, plaintiff did not object to defense counsels' comments in closing arguments.

B. Standard of Review

Typically, this Court reviews de novo claims of misconduct by counsel to determine whether a party was denied a fair trial. *Reetz v Kinsman Marine Transit Co,* 416 Mich 97, 100; 330 NW2d 638 (1982). "When reviewing claims of improper conduct by a party's lawyer, this Court must first determine whether the lawyer's action was error and, if so, whether the error requires reversal." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191; 600 NW2d 129 (1999). "A lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Id*. at 191-192. "Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunter v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996) (citations omitted).

Because plaintiff did not properly preserve this issue, we will review the matter to determine whether counsel's remarks "'may have caused the result or played too large a part and may have denied a party a fair trial.'" *Wiley v Henry Ford Cottage Hospital*, 257 Mich App 488, 501; 668 NW2d 402 (2003), quoting *Reetz, supra* at 103. In addition, reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Muci v State Farm Mutual Automobile Ins Co*, 267 Mich App 431, 442-443; 705 NW2d 151 (2005).

C. Challenged Comments and Arguments

1. Comments relating to needs, motives for the acquisition, and bad faith

Plaintiff argues that issues relating to needs, motives for the acquisition, and bad faith were irrelevant because necessity was not at issue, and the only issue for review was just compensation.

During opening statements, counsel for Joanne and Joan, stated that plaintiff was trying to move the Greyhound bus terminal onto defendants' property to get MGM's money for the Greyhound property. He further stated that plaintiff "was trying to get MGM's money for this property, which was effectively useless to anybody except the state unless you demolish the buildings, take MGM's money, move Greyhound out of there onto my clients property." During opening statements, counsel for Bernard, John, Michael, and Prime Parking (1) stated that "[t]here was a couple questionable items that occurred and those all occurred in our dealings with the state or MDOT" with regard to "good faith dealing," and (2) implied that the state was trying to take defendants' property to replace property they were giving to the casino, claiming that "[t]hey were doing directly that which they couldn't do indirectly." In closing, defense counsel also raised issues regarding plaintiff's honesty and good faith in dealing with respect to its interest in land for MGM and the demolition of one of its comparables.

The comments regarding MGM were not necessarily proper, but discussion regarding MGM was a significant part of the trial. Plaintiff's own witness, James Kandler, Jr., had sent a letter to then-Governor John Engler, attached as a comparable of plaintiff's, indicating that MGM was seeking to buy land from the state, but it was waiting for certain property to be

condemned to move the Greyhound terminal that was on the ground plaintiff was purchasing. Thus, these comments were at least linked to a letter that was attached to one of plaintiff's comparables. In addition, a significant amount of testimony and discussion revolved around the value of the land and the increase based on the potential of it being near the casino. Thus, this information as to where MGM may be located may have been minimally relevant in this regard. Just compensation requires that "all factors relevant to market value" be taken into account. *MDOT v Tomkins*, __ Mich App __; __ NW2d __ (Docket No. 256038, issued March 2, 2006), slip op at 3. Comments regarding the comparables, the numbers used in the comparables, and the circumstances surrounding from where Fuller derived his comparables were proper to comment on, as the case concerns the question of whose comparables more accurately reflect the true market value. However, plaintiff's motivation with regard to condemning the property was questioned, and these comments were not proper.

Although we agree that some of the statements regarding motivation were improper, any error was harmless and did not deny plaintiff a fair trial given that the trial court instructed the jury on more than one occasion that the comments, arguments, remarks, and statements of the attorneys were not to be considered as evidence. *Reetz, supra* at 105; *Tobin v Providence Hospital*, 244 Mich App 626, 641; 624 NW2d 548 (2001). The court informed the jury it was to consider only the sworn testimony of the witnesses and the exhibits offered. See *id.* at 106. Additionally, the trial court, in its final instructions to the jury, explained that:

> The owner must not be forced to sacrifice or suffer by receiving less than full and fair value of the property. Just compensation should enrich neither the individual at the expense of the public nor the public at the expense of the individual.
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> * * *
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> You award must be based upon the market value of the property as of the date of taking. By market value we mean a, the highest price estimated in terms of money that the property will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is adapted and for which it is capable of being used; b, the amount which the property would bring it were offered for sale by one who desired but was not obligated to buy; c, what the property would bring in the hands of a prudent seller at liberty to fix the time and conditions of sale; d, what the property would sell for on negotiations resulting in sale between an owner willing but not obligated to buy; e, what the property would reasonably be worth on the market for a cash price allowing a reasonable time within which to effect the sell.

We find that defense counsels' statements and arguments do not require reversal where the jury was instructed that the attorneys' statements and arguments were not evidence, and that its verdict should be based on market value which was specifically described. *Szymanski v Brown*, 221 Mich App 423, 429; 562 NW2d 212 (1997); see also *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996); *Dunn v Lederle Laboratories*, 121 Mich App 73, 91; 328 NW2d 576 (1982). We are not persuaded that defense counsels' statements and arguments were examples of "a studied purpose to prejudice the jury and divert the jurors' attentions from the merits of the case." *Kern v St Luke's Hospital Ass'n of Saginaw*, 404 Mich 339, 354; 273

NW2d 75 (1978); *Bd of Co Rd Comm'rs of the Co of Wayne v GLS LeasCo, Inc*, 394 Mich 126, 139; 229 NW2d 797 (1975); see also *Watkins, supra* at 339 (where counsel comments on facts relevant to a material issue at trial, reversal is not warranted on the basis of attorney misconduct). Nor are we persuaded that the comments were so prejudicial as to deny plaintiff a fair trial.[2] *Wiley, supra* at 501. Plaintiff was not denied a fair trial because the comments did not play "too large part," *Wiley, supra* at 501; thus, plaintiff is not entitled to relief in this regard.

2. Appeals to Sympathy and Self-Interest

Plaintiff also contends that it was denied a fair trial because statements and arguments by defense counsel appealed to sympathy and the self-interest of the jurors. Plaintiff cites multiple instances during opening statements and closing arguments during which defense counsel made comments that appeal to the jury's sympathy and to a particular comment with regard to self-interest.

During opening statement, defense counsel stated that condemnation was "an awesome power . . . . It's awesome because they can take *your* property" (emphasis added). In addition, defense counsel commented that the property had been owned by the family for eighty years, and that they had previously turned down an offer from plaintiff. During closing arguments, defense counsel indicated that defendants needed to be protected. Defense counsel also argued that with regard to the "[a]wesome power of condemnation," "you are the safeguard, checks and balances." Counsel further stated: "Don't let the state get away with this kind of conduct. We don't want sympathy, [we] just want what's fair." In contrast defense counsel also stated that the "award of just compensation is based on the highest [price] that the property could have commanded in the marketplace based on its highest and best use."

It is improper for a party to appeal to the sympathy and the self-interest of the jury during opening statement or closing argument. See *Rogers v Detroit*, 457 Mich 125, 147; 579 NW2d 840 (1998), overruled on other grounds *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). We find that defense counsel was not appealing to the sympathy and self-interests of the jury, but was instead commenting on the evidence and the law. Defense counsel was simply stating why defendants needed to receive just compensation. Moreover, defense counsel specifically stated that defendants did not want sympathy, but only what was fair – the highest price that the property could have commended on the market. The comments regarding "your" property, when read in context, do not appeal to self-interest but instead serve to explain what occurred. Even if the challenged comments were improper, they are not part of a "studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunter, supra* at 95. Furthermore, the trial court's instructions were sufficient to alleviate any

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[2] Although defense counsels' statements and arguments during trial may have been improper to a certain extent, after a review of the record, we conclude that plaintiff's counsel also engaged in some "verbal jousting" during the trial, and even used the term "greed" to explain defendants' behavior. *Dunn, supra* at 90-91 (although counsel's remarks "may have been improper," a new trial was not warranted after attorneys for both parties "engaged in frequent verbal jousting"); see also *Guider v Smith*, 157 Mich App 92, 102-103; 403 NW2d 505 (1987).

prejudice caused by these remarks. *Hunt, supra* at 65. As noted above, the trial court stated that arguments, remarks, and statements of the attorneys were not to be considered evidence. Instruction by a trial court to the jury before opening statements and following closing arguments that the statements of counsel are not evidence is generally sufficient to cure any prejudice which might arise from remarks by counsel that are improper. *Tobin, supra* at 641. Further, as noted above, the trial court specifically instructed as to what the jury should take into account in deciding just compensation and market value; the court instructed the jury not to use sympathy in reaching a verdict. Plaintiff was not denied a fair trial by the comments of defense counsel.

3. Denigrating Counsel

During opening statements, plaintiff's counsel commented on the central business district of Detroit. In response, during opening statement, defense counsel commented that plaintiff's counsel was from Lansing and did not know Detroit very well. A review of this statement in context does not support a finding of error. The statement was not inflammatory and was only used to explain a difference with regard to knowledge of the area. Regardless, any error was harmless and does not require reversal because it did not deny plaintiff a fair trial. The trial court, in directing the jury, noted on several occasions that the attorneys' statements were not evidence. This cured any error.

4. Cumulative Error

Because the statements made by defense counsel were either appropriate or had a minimal prejudicial effect that was cured by the trial court's instructions, there was no error warranting reversal. For the same reasons, the cumulative effect of any errors will not warrant a new trial. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000). Upon review of the combined challenged statements, we find that plaintiff was not denied a fair trial. See *Wiley, supra* at 501.

III

Plaintiff's second issue on appeal is that the trial court abused its discretion in excluding the testimony of its witness as a discovery sanction. We disagree.

A. Standard of Review

This Court reviews a trial court's imposition of discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). Whether a trial court has the authority to impose particular sanctions is a question of law subject to review de novo. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637; 607 NW2d 100 (1999). This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C), *Traxler v Ford Motor Co*, 227 Mich App 276, 282; 576 NW2d 398 (1998). A finding is clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made. *Traxler, supra* at 282. Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

B. Discovery Sanction

The trial court did not clearly err in finding that plaintiff's interview of Douglas Fura was a deposition when it was taken under oath, with a court reporter, and transcribed. Further, the circuit court did not abuse its discretion in excluding Fura from testifying when plaintiff did not notify defendants it was taking his deposition.

At trial, defendants raised concern regarding Fura, who had informed them that plaintiff had contacted him and told him there would be a deposition, but that subsequently, only plaintiff showed up and took his statement with a court reporter. The trial court indicated that it did not want to deal with the issue at the time. Defendants filed a motion to preclude Fura from testifying at trial and contended that the court rules require notice for deposition.

A few days into trial, defendants again argued that it was inexcusable for plaintiff to not inform them of taking Fura's deposition. Defendants suggested that this required the severe sanction of excluding Fura's testimony. Plaintiff responded that Fura's statement had not constituted a deposition, and that it was only a recorded statement taken under oath in the presence of a court report. The trial court indicated that the matter was problematic, and did not believe that Fura was a necessary witness when Fuller could be used for the same purpose.

The trial court allowed the parties to make a special record with Fura. Fura indicated that he was contacted by plaintiff with regard to being deposed, and was told that it would take approximately four hours. Fura expressed some frustration over this. Plaintiff therefore contacted him to say that there had been a change of plans, and that they would show up without the other side. Defendants argued that this indicated a gross violation of the court rules, which resulted in prejudice. Defendants contended that the appropriate remedy was to prevent Fura from testifying. Plaintiff argued that there had been no deposition, but merely a sworn statement. Defendants added that plaintiff conducted the interview in this manner because discovery had closed. The circuit court found that the examination of Fura by plaintiff was a deposition, and that the requirements were not met. Thus, the court granted defendants' motion to exclude Fura's testimony. Plaintiff requested clarification of the ruling, which the court declined. Plaintiff made an offer of proof that if Fura had been allowed to testify, he would have testified regarding the price of an exclusive right-to-sell agreement for adjacent property owned by Freda Alibri, and that he did not steer plaintiff toward defendants' or Alibri's property.

A deposition is defined in Black's Law Dictionary (6th ed, 1990), as

> testimony of a witness taken upon oral question or written interrogatories, not in open court, but in pursuance of a commission to take testimony issued by a court, or under a general law or court rule on the subject, and reduced to writing and duly authenticated, and intended to be used in preparation and upon the trial of a civil action or criminal prosecution.

Plaintiff's interview with Fura clearly meets the above definition. Fura's testimony was taken by plaintiff, reduced to writing and duly authenticated, and was taken in preparation for trial. Thus, we agree with the trial court that plaintiff deposed Fura and did so without giving notice to defendants.

Plaintiff argues that even if it did depose Fura, the trial court's sanction of excluding Fura's testimony was too harsh and unduly prejudicial. MCR 2.306(B)(1) provides in pertinent part:

> (B) Notice of Examination; Subpoena; Production of Documents and Things.
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> (1) A party desiring to take the deposition of a person on oral examination must give reasonable notice in writing to every other party to the action.

Clearly, plaintiff did not comply with this court rule. MCR 2.313, provides the following with regard to sanctions for discovery violations:

> (2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party, or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party, fails to obey an order to provide or permit discovery, including an order entered under subrule (A) of this rule or under MCR 2.311, the court in which the action is pending may order such sanctions as are just, including, but not limited to the following:
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> (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> (b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
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> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party . . . .

We note that MCR 2.313 specifically concerns violation of discovery orders. However, these same sanctions are available to the trial court for other discovery violations pursuant to the trial court's inherent power. See *Brenner v Kolk*, 226 Mich App 149, 159-160; 573 NW2d 65 (1997).

Although exclusion of testimony is typically a severe sanction, it has been employed for failure to give reasonable notice or giving no notice of depositions. See *Drosdowski v Supreme Council of Order of Chosen Friends*, 114 Mich 178, 180-181; 72 NW 169 (1897); *People v Paris*, 166 Mich App 276, 282; 420 NW2d 184 (1988); see also *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (2000). The factors that should be considered in determining the appropriate sanction include:

> (1) Whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions

> of the court's order; (7) an attempt by the [party] to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. [*Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

We find, after a review of these factors, that the trial court did not abuse its discretion in excluding the testimony of Fura. Plaintiff called and conducted the deposition without giving notice to defendants; thus, it was clearly intentional. Plaintiff had ample time to schedule a deposition in that discovery was extended on several occasions. Defendants did have sufficient notice that Fura may be called as a witness as he was listed as early as March 13, 2003, and was on other lists as well. The trial court acknowledged that this would be prejudicial to defendants, who were not permitted to attend and cross-examine at the point of deposition. There seem to be no other problems with plaintiff's compliance with the discovery rules. There was no showing that plaintiff attempted to cure, and the evidence supported that defendants found out by chance. It is hard to imagine a lesser sanction that would cure the prejudice of defendants' not being aware of this until the day of trial. The trial court did not abuse its discretion in excluding the testimony as a discovery sanction. In addition, plaintiff wanted Fura to testify, in large part, regarding the exclusive right-to-sell agreement for the Alibri property. The trial court excluded this comparable, and as stated *infra*, it did not abuse its discretion in this regard. Fura's testimony would not have been significant for purposes of plaintiff's case.

IV

Plaintiff's third issue on appeal is that the trial court abused its discretion in excluding relevant market date for the property in question. We disagree.

A. Standard of Review

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 509; 679 NW2d 106 (2004), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion, *Lewis v Legrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003), but an abuse of discretion can arise when the court admits evidence which is inadmissible as a matter of law, *Craig v Oakwood Hospital*, 471 Mich 67, 76; 684 NW2d 296 (2004).

B. Alibri Exclusive Right-to-Sell Agreement

Plaintiff contends that the trial court erred in excluding evidence of an exclusive right-to-sell agreement from the property adjacent to defendants' property. We find that the trial court did not abuse its discretion in excluding this evidence.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Wayne County v State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004). Evidence is

relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999); *Wayne County, supra*. The credibility of witnesses is a material issue. *Powell v St John Hospital*, 241 Mich App 64, 72; 614 NW2d 666 (2000). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Waknin v Chamberlain*, 467 Mich 329, 334; 653 NW2d 176 (2002). "Unfair prejudice" does not mean "damaging." *Lewis, supra.* Rather, unfair prejudice exists when there is a tendency that the evidence will be given undueor preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id*.

Plaintiff contends that the Alibri exclusive right-to-sell agreement was basically a listing agreement, in which adjoining property to defendants' was offered for sale in April 2002 for $38 per square foot. Initially, the trial court denied defendants' motion to exclude this comparable in an order dated August 6, 2004. However, at trial, the court decided the document was unfairly prejudicial and excluded it.

The exclusive right-to-sell agreement provided the following:

> This is to be a confidential offering. Broker is not place any signs on the property or do any mass mailing offering the property. Broker will contract owner with any prospects prior to giving any detailed information regarding the property. We will not sell to any other parking lot operator and reserve the right to refuse any offer.

Defendants assert that the document was unfairly prejudicial because: (1) it was not an agreement to list the property; (2) the agreement allowed Alibri to reject any offer; (3) excluded a significant pool of potential purchasers (will not sell to other parking lot operators); (4) was confidential and marketing was prohibited, thus, not on the marketplace; and (5) was replaced by a subsequent agreement that contained no price term, and made no reference to property value.

In *Detroit/Wayne County Stadium Authority v Drinkwater*, 267 Mich App 625, 632-633; 705 NW2d 549 (2005), this Court provided the following with regard to condemnation:

> In the condemnation setting, just compensation is defined as "the amount of money which will put the person in as good a position as the person would have been had the taking not occurred." *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999); *In re Acquisition of Land for the Central Industrial Park Project, Parcel 755*, 142 Mich App 675, 676-677; 370 NW2d 323 (1985); SJI2d 90.05. An award of just compensation is based on the fair market value of the property. Fair market value is to be determined as of the date of the taking. *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378; 663 NW2d 436 (2003). "Fair market value" is
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> > "the highest price estimated in terms of money that the land will bring *if exposed for sale in the open market* with a reasonable time allowed to find a purchaser buying with knowledge of all the uses

> and purposes to which it is adapted and for which it is capable of bring used; the amount which land would bring if it were offered for sale by one who desired, but was not obliged, to sell, and was bought by one who was willing but not obliged to buy; what the land would bring in the hands of a prudent seller, at liberty to fix the time and conditions of sale; what the property will sell for on negotiations resulting in sale between an owner willing but not obligated to buy; what the land would reasonably be worth on the market for a cash price, allowing a reasonable time within which to effect a sale." [Citation omitted; emphasis added.]

The evidence of the exclusive right-to-sell agreement was minimally relevant. However, the circumstances surrounding the agreement limited the probative value of the agreement. If presented to the jury, the jury may have been confused, giving the document more weight than it was entitled to. More importantly, the offer was not on the open market, it limited potential purchasers, and was confidential. See *Consumers Power, supra* at 745-746. In addition, questions remain regarding whether exclusive right-to-sell was bona fide. See *Grand Rapids v Ellis*, 375 Mich 406, 411-412; 134 NW2d 675 (1965); *Kalamazoo v Balkema*, 252 Mich 308; 233 NW2d 325 (1930). The reasons listed by defendants were brought before the trial court, and the trial court carefully considered the comparable. Because of the location of the property, the evidence could have had a significant effect on the jury. Also, because the property was not on the open market, the evidence was minimally probative. The trial court did not abuse its discretion in excluding the minimally relevant evidence and finding that its unfair prejudice would have substantially outweighed its minimal probative value.

V

Plaintiff's final issue on appeal is that the trial court abused its discretion in failing to give its requested special instruction regarding attorney fees and just compensation. We disagree.

A. Standard of Review

On appeal, claims of instructional error are generally reviewed de novo. *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). This Court reviews a trial court's decision regarding special jury instructions for an abuse of discretion. *Chastain v General Motors Corp*, 254 Mich App 576, 590; 657 NW2d 804 (2002). "An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). There is no reversible error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

B. Special Instruction Request

Plaintiff argues that the trial court erred in refusing to instruct the jury that it should not consider litigation costs, including attorney fees, expert witness fees, interests, and other costs of litigation when determining just compensation. Defendants argue that the special jury instruction on attorney fees, interests, and costs was extremely prejudicial to defendants and unnecessary because it was pure speculation that a jury would consider these types of expenses.

The trial court has discretion to give additional instructions not covered by the standard jury instructions as long as they were applicable, accurately stated the law, and were concise, understandable, conversational, unslanted, and nonargumentative. MCR 2.516(D)(4); *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 422; 493 NW2d 447 (1992). The trial court gave M Civ JI 90.23, which provides:

> In reaching a verdict, you must keep within the range of the testimony submitted. You may accept the lowest figure submitted as to a particular item of damage, the highest figure submitted, or a figure somewhere between the highest and lowest. You may not go below the lowest figure or above the highest figure submitted.
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> In this case, the lowest valuation placed in evidence for the property is $605,000 and the highest valuation is $1,100,000. Any award between those two figures would be a proper jury verdict. Any award which is not between those two figures would not be a valid jury verdict.

This instruction indicated that the figure was to be based on the figures submitted by the experts, and that it had to be within the range of figures presented. The jury was also instructed with M Civ JI 90.06, which provides: "Your award must be based upon the market value of the property as of the date of taking."

The standard instructions given adequately informed the jury of the applicable law.[3] The

[3] Plaintiff claims that jury raised the issue. However, the record reveals that plaintiff's counsel raised the issue during voir dire when he asked a juror if he or she could do the job if the job was "to look at the fair market value of the property as of that date, that the issues such as attorney's fees for this case, interest, litigations costs, will be handled by the Judge after you issue your verdict." The court asked the attorneys to approach. Subsequently, the issue came up again between the attorneys and the trial judge indicated that he was not giving plaintiff's instruction regarding post-judgment fees because the jury "never would have thought of it." Counsel was forbidden from mentioning it again.

trial court did not abuse its discretion in declining to give the requested special instruction.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey